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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1488

ROGERS C. B. MORTON, SECRETARY OF INTERIOR,
Appellant,

vs.

STATE OF NEW MEXICO, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BRIEF OF AMICI CURIAE ON THE MERITS

**CENTRAL COMMITTEE
OF NEVADA STATE GRAZING BOARDS AND
DUCKWATER SHOSHONE TRIBE**

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PREFACE

This joint Brief filed by the Central Committee of Nevada State Grazing Boards and the Duckwater Shoshone Tribe closely follows the brief filed previously by the Central Committee of Nevada State Grazing Boards and the Nevada Board of Agriculture in answering the Appellant's Jurisdictional Statement. This Brief in addition will set forth the interests of the Duckwater Shoshone Tribe and answer arguments advanced by Amici supporting the Appellant.

OPINION BELOW

The opinion of the District Court is not yet reported and appears as Appendix A in the Appellant's Jurisdictional Statement.

JURISDICTION

The jurisdiction of this Court was invoked by the Appellant under 28 U.S.C. 1252 and 1253 and is not questioned by the Amici.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article IV, Section 3 of the United States Constitution (the "Property Clause") provides in part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any Claims of the United States, or of any particular State.

2. Amendment X, of the United States Constitution (the reserved "Police Powers") provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. The Wild Free-Roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. (Supp. III) 1331-1340, enacted December 15, 1971, is reproduced in Appendix F of the Appellant's Jurisdictional Statement.

4. Act of Congress (1864) Enabling the People of Nevada to Form a Constitution and State Government, 13 Stat. 30-32 (1864) provides in part:

> That the inhabitants of that portion of the territory of Nevada included in the boundaries hereinafter designated be, and they are hereby, authorized to form for themselves, out of said territory, a state government, with the name aforesaid, which said state, when formed, shall be admitted into the Union upon an equal footing with the original states, in all respects whatsoever.

CONSENT

Both the Central Committee of Nevada State Grazing Boards and the Duckwater Shoshone Tribe appear with the consent of the Appellant and Appellees pursuant to Rule 42 (1) of the Supreme Court Rules.

INTEREST OF AMICI CURIAE

The Central Committee of Nevada State Grazing Boards (Central Committee) is a representative body of members of the several District Grazing Boards. Such Committee membership is comprised of knowledgeable, actual users of the western range, N.R.S. 568.170, as

amended in 1975, who in turn were chosen from District Grazing Boards, N.R.S. 568.060, as amended in 1975.[1] The purpose of the Central Committee is to manage and improve the ranges within the State of Nevada, N.R.S. Chapter 568.

The Duckwater Shoshone Tribe (Shoshone Tribe) is a tribe of approximately 125 Indian people living on the small Duckwater Indian Reservation in Northeastern Nye County, Nevada. Their only source of income is raising livestock—livestock that necessarily must spend part of the year grazing on the "public domain" managed by the Bureau of Land Management (BLM). The rapidly exploding "wild and free roaming horse" population is detrimentally affecting many facets of their way of life—depletion of range lands, diminution of deer herds, and now, a real threat by the BLM to make drastic cuts in the number of livestock they are allowed to run on the "public domain" in order to provide "wild horse" forage. After years of adapting to "white man's" agrarian ways, these Indian people once again seem to have misplaced their reliance on "white man" and their Trustee—the Department of the Interior.

The Central Committee and the Shoshone Tribe both have a deep interest in having the Appellees' position affirmed. At stake is the local control and sovereignty

1. The membership qualification procedure prior to the 1975 amendment and the amended statute, N.R.S. 568.060 are set forth in Appendix B. The 1975 amendment provides generality and independence from possible change in the practice and regulations of the Bureau of Land Management. The issue as to continued existence of Grazing District Advisory Boards under the Taylor Grazing Act, 43 U.S.C. Sec. 315o-1 since the passage of the Federal Advisory Committee Act, Pub. L. 92-463, 86 Stat. 770, 5 U.S.C. Appendix I, is presently before the United States District Court, District of Nevada, in *Carpenter* v. *Morton*, Civil R-75-1-BRT.

of Nevada in dealing with local problems affecting agriculture and livestock production—a large segment of Nevada's economy, and virtually the only economy of many western states' Indian reservations such as is inhabited by the Shoshone Tribe. Any position less than total affirmation of the Court below would cast serious aspersions on the Central Committee's authority to continue serving Nevada by carrying out its statutory duty on the vast majority of lands within the State and would deal a damaging blow to the economy of the State. Nevada, being composed of eighty-six (86%) per cent federally owned land[2] is second only to Alaska in such percentage of federal ownership and is the leader in "wild and free-roaming horses and burros" with approximately 25,000.[3] Should the Appellant prevail, Nevada's control of estrays would be emasculated, as would its ability to control diseased animals or perform range improvements of the federally owned 86% of Nevada. The United States will have lost a valuable service and Nevada will have at least lost agricultural self-rule. Additionally, the Shoshone Tribe, as with other livestock producers, should their livestock grazing permits be cut back to provide "wild horse" forage, will have lost a way of life.

STATEMENT OF THE CASE

The Amici Curiae adopt the Statement of the Case made by the Appellees.

2. Inventory Report on Real Property Owned by the United States throughout the World, as of June 30, 1967, General Services Administration, Washington, D. C. Table 4, p. 46.

3. Effects of Livestock Grazing on Wildlife, Watershed, Recreation and Other Resource Values in Nevada, U.S. Department of Interior, Bureau of Land Management, February, 1975, at pp. 35-36.

QUESTION PRESENTED

Whether a Three-Judge Federal District Court correctly held the Wild Free-Roaming Horses and Burros Act unconstitutional as exceeding the power of Congress to protect federal lands, and as infringing on the "Police Powers" reserved to the States.

INTRODUCTION AND SUMMARY

The term "Wild Horses" conjures up visions of that gallant steed escaping from the Spanish Conquistadors to roam the prairie. The problem with allowing such romanticism to prevail is that the term has been expanded to cover horses recently wandering from local ranches, or horses recently released to fend for themselves during hard winter months. What truly are "wild horses" today, if there is such a thing, nobody seems to know.[4] Information is sketchy as inventories are usually made by aircraft where branding or other indicia of prior private use cannot be ascertained.

Several facts are certain: 1) Most horses and burros on the western range can be traced to either direct private ownership or recent private control of the animals or their forebears; 2) In certain areas, the horses have proliferated so as to cause serious damage to range lands be they federal, state or private; 3) Range horses within

4. Hearings on H. R. 795, H. R. 5375 and Related Bills Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs, 92 Cong. 1st Sess. (1971). See Brief of Amicus Curiae International Association of Game and Fish Conservation Commissioners, page 9.

a comparatively short period of time of last domestic control adapt to the wild and become difficult if not impossible to capture or even approach; 4) Indigenous wildlife suffers or even disappears from its native range when horses proliferate and compete for food supplies.

These matters are of concern to the Amici who believe that the law is clear that the States have the rights and obligations to control wildlife within their borders as developed in the Common Law and under exercise of their "Police Powers", U.S. Const. Amend. X. It is necessary to proper and orderly management of livestock and agriculture, major contributors to Nevada's economy, as well as wildlife, that local matters be left to local control.

It is ironic that Congress has sought federal protection of "wild horses" when it is the local livestock interests that have introduced them onto the local ranges. Should they ever become endangered, the herds could quickly be replenished from the source from whence they came—the barnyard, a feat not possible for a truly endangered specie such as the Desert Bighorn[5] whose numbers are dwindling due in part to the domination of their original range by "wild free-roaming horses and burros".

It may seem strange, but as the life style of the western range land is being threatened by over-protection of non-indigenous animals, the Cowboys (Central Committee) and Indians (Shoshone Tribe) are banding together to ask this Honorable Court to apply a rule of reason and law that preserves their heritage, independence, the heritage of the West, the sovereignty of the State of Nevada, and the doctrine of *stare decisis*.

5. Nevada's state animal, N.R.S. 235.070.

ARGUMENT

The Wild Free-Roaming Horses and Burros Act Is Unconstitutional, Exceeding the Power of Congress to Protect Federal Lands and Infringing on the Police Powers Reserved to the States.

It is clear from the face of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. (Supp. III) 1331-1340, that it does not deal with the protection of federal lands. Simply stated, the Act protects "unbranded and unclaimed horses and burros", 16 U.S.C. 1332(b). Such definition includes unbranded private horses wandering into federal lands that cannot be located to be claimed.

The Amici do not doubt, nor do they argue against, the power of Congress to deal with the classical concepts of real property as associated with federal lands under the "Property Clause", U.S. Const. Art. IV, Section 3. The cases are consistent: *United States* v. *San Francisco*, 310 U.S. 16 (1940), conditions on disposal of public lands; *United States* v. *California*, 332 U.S. 19 (1947), offshore property rights; *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17 (1952), conditions on use of public lands; *Alabama* v. *Texas*, 347 U.S. 272 (1954), disposal of public lands; *Ivanhoe Irrigation District* v. *McCraken*, 357 U.S. 275 (1958), use of public lands and federal property.

The Appellant cites *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936) for the proposition that Congress's powers under the "Property Clause" extends to "what the land contain(s)". Again, the Amici cannot disagree with the authority cited, only with the appropriateness of its application to the issue—"wild free-roaming horses and burros" (ferae naturae). *Ashwander* dealt specifically with water and water rights on condemned

land, a concept long associated as being a real property right. The passage quoted by the Appellants is from a discussion of mineral rights reserved by the United States, rights truly contained in the land and again classically dealt with as real property. It is difficult to visualize "wild free-roaming horses and burros", or other wildlife as being "contained in the land". Such is inconsistent with notions of what is wild and free-roaming.

This Court has long held that the several states are charged with the responsibility and exclusive control of non-migratory wildlife within their external boundaries by Common Law rights and under exercise of their "Police Powers", U.S. Const. Amend. X, *La Coste* v. *Department of Conservation*, 263 U.S. 545, 549 (1924):

> The wild animals within its borders are, so far as capable of ownership *owned by the state in its sovereign capacity*, for the common benefit of all people. Because of such ownership, *and in the exercise of its police power, the state may regulate and control the taking, subsequent use and property rights that may be acquired therein.* (Emphasis added). (Citations omitted).

The rationale set forth in *La Coste* stems from a long pattern of cases recognizing state control of wildlife, *Geer* v. *Connecticut*, 161 U.S. 519 (1896) and *McCready* v. *Virginia*, 94 U.S. 391 (1865).

A more recent decision by this Court, *Toomer* v. *Witsell*, 334 U.S. 385 (1948), reiterated your long-standing position. *Toomer* dealt with the discriminatory taxation and licensing ($25 v $2500) of non-resident shrimp fishermen off the coast of South Carolina. While holding that such a wide divergence of taxation and license fees was a violation of the "Privileges and Immunities Clause",

U.S. Const. Art. IV, Section 2, Justice Frankfurter sets forth in his concurring opinion the body of law that had developed, *supra* at 408, 409:

> . . . A state may care for its own [resources] in utilizing the bounties of nature within her borders, because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers.
>
> When the Constitution was adopted, such, no doubt, was the common understanding regarding the power of States over its fisheries, and it is this common understanding that was reflected in McCready v. Virginia, 94 U.S. 391, 24 L.Ed. 248. *The McCready case is not an isolated decision to be looked at askance. It is the symbol of one of the weightiest doctrines in our law.* It expressed the momentum of legal history that preceded it, and around it in turn has clustered a voluminous body of rulings. Not only has a host of State cases applied the McCready doctrine as to the power of the States to control their game and fisheries for the benefit of their own citizens. . . (Emphasis added).

The above position has never been repudiated with both state and federal decisions so holding being too numerous to chronicle herein. However, other pertinent decisions of this Court and applicable recent decisions of the lower federal courts are: *Hunt* v. *Arizona,* 278 U.S. 96 (1928); *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928); *Silz* v. *Hefterberg,* 211 U.S. 31 (1908); *Ward* v. *Race Horse,* 163 U.S. 504 (1896); *Burgess* v. *M/V Tamano,* 370 F.Supp. 247 (D.C. Maine 1973); *Maine* v. *M/V Tamano,* 357 F.Supp. 1097 (D.C. Maine 1973); *Maryland* v. *Amerada Hess Corp.,* 350 F.Supp. 1060 (D.C. Md. 1972);

United States v. *Plott,* 345 F.Supp. 1229 (D.C. N.Y. 1970); and *New Mexico State Game Commission* v. *Udall,* 410 F.2d 1197 (10th Cir. 1969).

The Appellants attempted to bolster their plea by raising the spector of all the wildlife protection legislation that must fall if the judgment is affirmed. This "parade of the horribles" just cannot be supported in the law, the constitutional infirmities present in the Wild Free-Roaming Horses and Burros Act being absent in the other legislation.

The Wild Free-Roaming Horses and Burros Act speaks of "public lands of the United States" in the definition of "wild free-roaming horses and burros" and "public lands of the United States" has come to mean ". . . those lands subject to sale or disposal under general laws (Newhall v. Sanger, 92 U.S. 761, 23 L.Ed. 769 (1875)). . .", *United States* v. *Kipp,* 369 F.Supp. 774, 775 (D.C. Mont. 1974).

The vast public domain has been reduced from general use, entry and acquisition by withdrawals of reservations, parks, monuments, refuges and other special uses for Indians, military needs, recreation, and conservation. The law is replete with authority for Congress to act under the "Property Clause", U.S. Const. Article IV, Section 3, in making such withdrawals and reservations. Such land so withdrawn or reserved is no longer "public land of the United States", instead it becomes a different class of federally owned land. This distinction is so well engrained in our understanding that District Judge Russell Smith saw fit to set forth a general dictionary definition so noting the distinction.[6] Judge Smith finished his dis-

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6. Webster's Third New International Dictionary 1836 (1966) defines "public land" as "land owned by a government, esp. a national government; *specif*: that part of the U. S. public domain subject to sale or disposition under the homestead laws."

cussion on this point by stating, *supra* at 775, 776: ". . . and were the problem merely one of statutory construction it is quite clear that lands in Glacier Park would be held not to be public lands of the United States." See also: *Oklahoma* v. *Texas*, 258 U.S. 574 (1922).

With such a withdrawal or reservation of refuge and park lands from the "public lands" the Appellant should not fear for those refuges and wildlife in parks as is provided for in 16 U.S.C. 671-697a, and 16 U.S.C. 26, 98-99. A special level of federal control has attached because of the special use to which the lands are put.

In many instances, the park or refuge is doubly protected because of a ceding of state jurisdiction to the federal government: Yellowstone National Park, Act Admitting State of Wyoming into the Union, July 10, 1890, 26 Stat. 222, 1891 Mont. Laws 262, February 14, 1891, *Yellowstone Park Transp. Co.* v. *Gallatin County*, 31 F.2d 644 (9th Cir. Mont. 1929), *cert. denied*, 280 U.S. 555 (1929); Mount Rainier National Park, 1901 Washington Session Laws 192, *Rainier Nat. Park Co.* v. *Martin*, 23 F.Supp. 60 (D.C. Wash. 1938), *aff'd*, 302 U.S. 661 (1938); Mesa Verde National Park, Act of the Legislature of Colorado, approved May 2, 1927, see 16 U.S.C. 117; Pisgah National Game Preserve, 1915 North Carolina Laws 205, N.C. Code Ann. (1939), Sec. 2099 (4th Cir. N.C.); *Chalk* v. *United States*, 114 F.2d 207, *cert. denied*, 312 U.S. 679 (1941).

The other federal acts cited by the Appellant as dangerously in conflict with the lower court's opinion are self-cleansing—they contain either specific language ruling against such confrontation with State fish and game laws, or they are easily distinguished.

The National Wildlife Refuge System Act of 1966, as amended, 16 U.S.C. 668dd-668ee, specifically states, Section 668dd(c):

> The provisions of this Act shall not be construed as affecting the authority, jurisdiction or responsibility of the several States to manage, control or regulate fish and resident wildlife under State law or regulations in any area within the System.

The Wild and Scenic Rivers Act, 16 U.S.C. 1271 et seq. specifically states, Section 1284(a):

> Nothing in this chapter shall affect the jurisdiction or responsibilities of the States with respect to fish and wildlife.

The Endangered Species Act of 1973, 16 U.S.C. (Supp. III) 1531 et seq. specifically states, Section 1533(d):

> The Secretary may by regulation prohibit with respect to any threatened species . . . except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to Section 1535(a) of this title *only to the extent that such regulations have also been adopted by such State.* (Emphasis added).

Both the Fur Seal Act of 1966, 16 U.S.C. 1151 et seq. and the Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. (Supp. III) 1361 et seq. will find continued and prosperous life regardless of the outcome of this appeal: they find their basis in the Commerce powers of the Congress, U.S. Const. Art. I, Section 8. See 16 U.S.C. 1151 where authority over fur seals is vested in the Secretary of Commerce, and 16 U.S.C. 1361(5) where Congress expressly found in the statute itself, that marine mammals or their products move in interstate commerce.

More deserving of consideration would be the implied reversal of all states' fish and game laws, estray laws

and diseased animal laws at least as to "public lands", not to mention a long-standing body of law, should the lower court's opinion be overturned. "To maintain the balance of our federal system, insofar as it is committed to our care, demands at once zealous regard for the guarantees of the Bill of Rights and due recognition of the powers belonging to the states," *Milk Wagon Drivers Union of Chicago* v. *Meadowmoor Dairies*, 312 U.S. 287, 297 (1941). Statehood of our "public land states" is at issue as we approach our bicentennial year.

COMMERCE CLAUSE

Several of the briefs favoring the Appellant's position make passing reference to the Commerce Clause, U.S. Const. Art. I, Section 8, opining that it has application in the instant case. The District Court in their Memorandum Opinion found otherwise:

> ". . . No evidence was presented to support this theory; in fact, all the evidence establishes that the wild burros in question here do not migrate across state lines. Further, the Congress made no finding to indicate that it was in any way relying on the Commerce Clause in enacting this statute."

See: Appellant's Jurisdictional Statement, Appendix A, Page 5a.

Nevertheless, Amicus Curiae Hope Ryden attempts to establish "Commerce Clause" facts by citing "wild horse" herds that straddle state boundaries. Her argument is self-defeating.

Amicus Ryden points to "wild horse" herds in the Pryor Mountains along the Montana-Wyoming border,

along the Nevada-California border, in the Bookcliff Mountains along the Colorado-Utah border, and on Assategue Island along the Maryland-Virginia border. *Every case she cites involves an arbitrarily placed state boundary—none following natural, geographical boundaries such as major rivers, or major mountain divides.* She admits that the "wild horses" remain in geographical islands—particularly mountain ranges or on actual islands.

Wild horses are just not migratory in the nature of federally regulated migratory wildlife. They do not travel from Canada to Central America as do ducks, geese and doves. Nor do they spend several years of their lives in the depths of the Pacific Ocean as do the fur seal and the salmon. To call horses that spend their entire lives in a small geographical area bisected by a stateline migratory, would lead to the conclusion that the commuters in some of our large metropolitan areas—Chicago, Illinois-Gary, Indiana; New York, New York-Stamford, Connecticut; Kansas City, Missouri-Kansas City, Kansas—are migratory.

CONCLUSION

The Central Committee and the Shoshone Tribe believe that Nevada should be able to control estrays, diseased animals, fish and game, and promote range management within the boundaries of Nevada. Should these obvious rights under the state's police powers be stripped, state sovereignty is necessarily questioned.

The fears of Nevada (86% federally owned) and New Mexico (34% federally owned) were expressed by Justice White in *Ward* v. *Race Horse, supra,* at 514, in answering an Indian's claim that treaty hunting rights extended to all "public lands" within Wyoming:

> The power of all the states to regulate the killing of game within their borders will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the State of Wyoming [Nevada, New Mexico], that state would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the state. Wyoming [Nevada, New Mexico] then, *will have been admitted into the Union, not as an equal member,* but as one shorn of a legislative power vested in all the other states of the Union, a power resulting from the fact of statehood and incident to its plenary existence. (Emphasis added).

Nevada's Enabling Act, 13 Stat. 30-32 (1864) provides that Nevada ". . . shall be admitted into the Union upon an equal footing with the original states, in all respects whatsoever."

Respectfully submitted,

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APPENDIX A

Pertinent parts of N.R.S. Chapters 569 and 571 provide as follows:

569.005 *Definitions*

. . .

2. "Estray" means any livestock running at large upon public or private lands in the State of Nevada. . .

3. "Livestock" means:

. . .

(b) All horses, mules, burros and asses or animals of the equine species;

569.010 *Estrays deemed property of state department of agriculture; disposition of moneys collected for sales, injuries or killing.*

1. Except as otherwise provided by law, all estrays within the State of Nevada shall be deemed for the purpose of this section to be property of the department.

571.120 *Duties of state department of agriculture.* The department shall do all things necessary for the control and eradication of infections, contagious or parasitic diseases of livestock.

571.240 *Inspection of livestock about to be removed from state.*

1. Inspectors may inspect any or all livestock about to be shipped, driven, transported or otherwise removed from the state.

APPENDIX B

Qualifications for membership to the state grazing boards prior to the 1975 amendment were:

568.060 *State grazing boards: members; chairman; qualifications.* The members and the chairman of each of the state grazing boards shall be the members and chairmen of each of the boards of district advisors of each grazing district elected, qualified and serving under the provisions of the Taylor Grazing Act and the regulations promulgated under the provisions of that act, except that membership on such state boards shall be limited to residents of the State of Nevada.

Qualifications for membership subsequent to the 1975 amendment of the Nevada Legislature will be:

568.060 1. The members and the chairman of each of the state grazing boards for the year 1975 shall be the members and chairmen of each of the boards of district advisors of each grazing district elected, qualified and serving on July 1, 1975, under the provisions of the Taylor Grazing Act and the regulations promulgated under the provisions of that act except that membership on such state boards shall be limited to residents. Such members shall serve until their successors are elected and qualified as provided in this section.

2. On and after January 1, 1976, each state grazing board shall consist of not less than five nor more than twelve stockmen who graze livestock upon the public lands within the grazing district for which such state grazing board is created. Officers and directors

of corporations and partners of partnerships which conduct such grazing are qualified to be elected to serve on such boards on behalf of such corporation or partnership. The term of each member is 3 years, beginning on January 1 next after his election.

See Advance Sheets, 1975 Nevada Stats. Chapter 386.